No. 80-433

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

CALVIN W. COLE,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

KENNETH E. LABOWITZ
LABOWITZ AND LABOWITZ
605 Prince Street
Alexandria, Virginia 22314
(703) 548-2029

Counsel for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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CALVIN W. COLE,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

1. Was the defendant denied his constitutionally-guaranteed right to confrontation of the witnesses against him when the trial court refused to permit cross-examination as to the credibility of chief government witness against him?

2. Can exculpatory denials by a criminal defendant to questions posed by government agents during an investigation be used against that defendant when the investigation produces indictments and prosecution against him?

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Petitioner Calvin W. Cole respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the opinion and judgment of that court rendered in these proceedings on June 3, 1980.

OPINION BELOW

The per curiam opinion of the panel of the Fourth Circuit, dated June 3, 1980, is reported at 622 F.2d 98, and is reproduced as an appendix hereto.

JURISDICTION

The judgment and opinion below were entered on June 3, 1980. The opinion of the panel of the Fourth Circuit, writing per curiam, is attached in the Appendix hereto, p. 1a. A timely petition for rehearing, filed on behalf of the Petitioner, was denied by the panel of the Fourth Circuit on July 23, 1980. A copy of that denial order is attached in the Appendix hereto, p. 1b. Petitioner's timely petition for rehearing *en banc* was denied by order dated August 21, 1980, and a copy of that order of denial is attached in the Appendix hereto, p. 1c.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. The Proceedings Below.

Petitioner Calvin W. Cole was indicted on June 4, 1979, in the United States District Court for the Eastern District of Virginia, at Alexandria. The indictment charged him with violations of 18 U.S.C. §§641, 1001, and 287, all in connection with his receipt and presentation for payment of a United States Treasury check in October, 1974. Prior to trial, defense counsel moved to dismiss the second count of the indictment, charging false statements in response to government agents' inquiries, and, with the concurrence of the United States, the count alleging violation of 18 U.S.C. §1001 was dismissed.

The case proceeded to trial before the Honorable Albert V. Bryan, Jr., and a jury, on July 26, 1979. Petitioner was found guilty of Count One of the indictment, violation of 18 U.S.C. §641, and the third count was dismissed on motion of the United States when the jury announced itself deadlocked on that count.

On September 7, 1979, Judge Bryan sentenced Petitioner to two years' imprisonment, with imposition of all but four months suspended. Four years' supervised probation was also assessed. A timely notice of appeal was filed to the United States Court of Appeal for the Fourth Circuit.

On June 3, 1980, a panel of the Fourth Circuit affirmed Petitioner's conviction. A timely petition for rehearing was denied on July 23, 1980. Petitioner's timely petition for rehearing *en banc* was denied on August 21, 1980.

B. The Relevant Facts.

Petitioner Calvin W. Cole was indicted for three offenses arising out of his receipt of a United States Treasury check issued to Virginia International Testing Laboratories (VITL), in the amount of $69,894.08. This check was sent to VITL's post office box in McLean, Virginia, and was deposited in the corporate account by Petitioner, VITL's president. The indictment alleged that Mr. Cole knew or should have known that the check had been issued to VITL by mistake, and should have been paid to a bank in Maryland, assignee of the proceeds of a government contract held by VITL.

Prior to trial, defense counsel moved to dismiss Count Two of the indictment, which alleged that Petitioner made false statements in response to questions asked him by government investigators. Judge Oren Lewis granted the defense motion that the count alleging violation of 18 U.S.C. § 1001 be dismissed.

Immediately prior to the start of the trial, defense counsel moved to bar all references to the "exculpatory no" responses made by Petitioner to the investigators' questions. Petitioner's contentions focused on the dismissal of the 18 U.S.C. § 1001 count and the intentions of the United States to present evidence of Petitioner's denials after receipt of the check and the start of the government investigation into it. Petitioner contended that all statements after his receipt of the check on October 24 were inadmissible. Judge Albert V. Bryan, Jr., denied the motion and the case proceeded to trial.

The United States presented testimony from James Williams, contracting officer for the General Services Administration and responsible for oversight of the contract with VITL. He described the process by which VITL

presented vouchers to him for the work performed under the contract, which he then approved and sent to the GSA liaison office with Treasury. This office then authorized issuance of a Treasury check to a bank in Maryland that was assignee of the contract proceeds.

While VITL had a voucher for $97,000 in payments pending, an Internal Revenue Service lien was attached to approximately $27,000 of the payments due. In the meantime, Petitioner and Mr. Williams began negotiations for the fifth modification to the underlying contract, to increase the contract rate for VITL's work in light of increased fuel costs and the reduced national speed limit in 1974.

Mr. Williams testified that Modification Five was approved October 15, 1974, and countersigned by Petitioner two days later. The modification entailed additional GSA payments to VITL of approximately $77,000. Some payments were due immediately upon approval of the contract modification, and the remainder were to be paid as the contract work was performed.

Mr. Williams acknowledged under cross-examination that this was the first in the five modifications to the contract that involved additional payments, and that he and Petitioner had no discussions as to the designation of the payee for these additional payments.

Mr. Williams then stated that his first contact with Petitioner as to VITL's need for more money came in September, 1974. Defense counsel attempted to impeach Mr. Williams through a *Washington Star-News* clipping, containing an article discussing VITL and Petitioner and the effects on their program as a result of the increase in fuel prices. The newspaper article quoted a government official who acknowledged VITL's need for more money as of July, 1974. Mr. Williams conceded reluctantly that he was the spokesman quoted.

Judge Bryan sustained the United States' objection to this line of cross-examination. The court stated that "I'm not sure that the need for money has anything to do with this offense."

Other government witnesses testified to the fact that issuance of the check directly to VITL, rather than to the assignee bank, was purely a product of the government's error, and was in no way produced by any actions by Petitioner or VITL. Two GSA officials described their efforts to track down the check in the fall of 1974, including contacts with Petitioner. They acknowledged that GSA failed to stop payment on the check prior to its presentation. Further, they each stated that on several different occasions Petitioner was asked if he had received the check and he denied its receipt in October, November, and December, 1974. The check in question was payment on the $97 voucher, reduced by the IRS tax lien, rather than payments under Modification Five.

In his own defense, Petitioner admitted receiving the check on October 24, 1974. That same day, he deposited the check in the VITL corporate account, from which the proceeds were applied to corporate obligations within a few days. He stated that he believed that the check was for additional compensation under Modification Five, as he had been discussing with Mr. Williams. In the absence of specific discussions to the contrary, he believed that the payments under the modification were to be made directly to VITL, rather than to the assignee bank. He denied any intent to embezzle or to make false claims against the United States. He stated that his denial of receipt of the check in October, 1974, were accurate, as he did not receive the check until October 24. He could not recall making such denials in November, and said that the denials in December, 1974, were made concerning what he believed to be a different check from that which he had received and presented for payment.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below conflicts with constitutional guarantees concerning a criminal defendant's right to cross-examination as formulated by this Court and the Fourth Circuit itself.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to confrontation of the witnesses against them in a public trial. This right has been identified as one that is an essential and fundamental requirement for a fair trial. *Pointer v. Texas,* 380 U.S. 400 (1965); *Alford v. United States,* 282 U.S. 687 (1931). Indeed, the essential nature of the right to confrontation and to cross-examination has been recognized by the Fourth Circuit in its opinion below, and by another panel of the court in the recent opinion in *United States v. Caudle,* 606 F.2d 451 (4th Cir. 1979).

In its *Caudle* opinion, the Fourth Circuit panel discusses in elaborate detail that a "full cross-examination of a witness upon the subjects of his examination in chief is the right, not the mere privilege, of the party against whom he is called." Numerous case authorities are cited in *Caudle* by the court in its examination of the derivation of this right and the situations in which it arises. Primary among these authorities is the Court's opinion in *Davis v. Alaska,* 415 U.S. 308 (1974), which emphasizes that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."

As the Fifth Circuit recognized in *United States v. Bass,* 490 F.2d 846, 857-858 n. 12 (5th Cir. 1974), full cross-examination addressed to a relevant area of inquiry is a right, and, while the scope of cross-examination is within the discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only after there has

been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment. Similarly, the Tenth Circuit in *United States v. Jorgenson,* 451 F.2d 516 (10th Cir. 1971), *cert. denied,* 405 U.S. 922 (1972), distinguished the right of confrontation into *areas* of cross-examination from the discretionary power of trial judge to limit the *extent* of cross-examination into a particular area. The Tenth Circuit found that a limitation that prevents cross-examination into an area that is properly subject to cross-examination constitutes reversible error. The characteristic feature of this situation, the Tenth Circuit held, is the complete denial of access by the trial court to an area that is properly the subject of cross-examination. See also *Smith v. Illinois,* 380 U.S. 120 (1968).

Full examination into matters relating to a witness' credibility is at the heart of the system of jury trial guaranteed by the United States Constitution. Denial of the right to cross-examination of a witness for the prosecution as to matters bearing on the trustworthiness of his testimony cannot be considered to come within the trial court's discretion. *Smith v. Illinois, supra; United States v. Kartman,* 417 F.2d 893 (9th Cir. 1969).

In this instance, the trial court precluded defense counsel from all inquiries into a matter bearing directly on a critical prosecution witness' testimony. Mr. Williams demonstrated throughout cross-examination his hesitation and reluctance to answer questions directly. He stated that his first knowledge of the imperiled financial condition of VITL came only in September of 1974, scarcely a month before negotiation of the fifth modification to the contract. Counsel attempted to directly impeach his testimony as to the important matter of his awareness of VITL's condition, through a newspaper article that Mr. Williams conceded, after much hesitation, quoted him in July, 1974, as acknowledging such financial straits.

This entire area of inquiry, so as to impeach the primary government witness on a point related to the witness' entire attitude toward VITL and the defendant charged, was precluded by the trial court. The credibility of the witness, and the trustworthiness of his testimony, was never tested before the jury, so as to provide the jury with a basis for evaluating the testimony he was presenting.

In its opinion below, the Fourth Circuit panel dismissed in a casual fashion the denial of this right guaranteed the Petitioner. In a single paragraph, the court below noted the essential nature of the right to cross-examination and confrontation, as reaffirmed some months before by their brethren deciding the *Caudle* case. Yet the panel below examined not at all the circumstances presented in Petitioner's trial, and cited to *Davis v. Alaska* for the point that the trial court is not deprived of all discretion "in limiting needless or confusing inquiry into collateral matters." Appendix, at p. 5a. No such matters were presented here.

The opinion below also attempts to support its holding with a citation to the Tenth Circuit opinion in *United States v. Haro,* 573 F.2d 661 (10th Cir.), *cert. denied,* 439 U.S. 851 (1978). The *Haro* opinion, rather than examining the extent to which a criminal defendant may test his accusers' credibility and trustworthiness, is instead totally inapplicable to the situation presented in this trial. The defendant in *Haro* was granted "considerable latitude" in his cross-examination of a key government witness. A dispute arose in that trial after defense counsel asked and had answered twelve questions relating to the witness' previous convictions.

The *Haro* opinion cannot support the denial of Petitioner's right to cross-examination in this instance. Mr. Williams' credibility and trustworthiness were proper areas of cross-examination, and access to such areas was denied.

Therefore, Petitioner's right to a fair trial was denied, because the jury could not consider such matters in evaluating and deciding Petitioner's guilt or innocence.

2. Affirmance of the admissibility of exculpatory denials by the defendant in response to government agents' inquiries conflicts with decisions prohibiting their use in other circuits.

Petitioner raised as an evidentiary matter the admissibility of his exculpatory denials to government agents' questions to him as part of their investigation into the issuance of the check to VITL. Objection to such statements' admissibility was raised prior to trial, at each point in the trial prior to testimony to that effect, and on appeal before the panel of the Fourth Circuit. The trial court permitted testimony as to those denials, and the Fourth Circuit panel, without addressing authorities from other circuits to the contrary, affirmed their admission.

The testimony of the two government agents was as to out-of-court declarations by the Petitioner to them, denying rec ipt of the check. In essence, Petitioner was denying the commission of a crime against the United States. According to the testimony by the two agents, Petitioner denied receipt of the check on three occasions, all in response to the agents' inquiries. The indictment against the Petitioner included a count alleging violation of 18 U.S.C. §1001, for making allegedly false statements to the government agents concerning the receipt of the check. This count was dismissed on motion of the Petitioner, with the concurrence of the United States, in light of a number of cases denying applicability of criminal sanctions to "exculpatory no" responses to government agents' inquiries.

In these circumstances—the denial by a potential defendant to inquiries by government agents as to the defendant's

commission of a crime—both the Sixth Circuit and the Fifth Circuit have found error in the admission of such testimony by the government agents. The Sixth Circuit in *United States v. Readus,* 367 F.2d 689 (6th Cir. 1966) found such statements to be inadmissible hearsay. Similarly, in *Ledet v. United States,* 297 F.2d 737 (5th Cir. 1962), a denial by the defendant was held to be inadmissible under the same principles. It is significant to note that, in both *Readus* and *Ledet,* defense counsel failed to object to such testimony, but the courts in each case took notice of the plain error in its admission.

In this instance, defense counsel went to considerable lengths to enter his objections and to preserve the error. However, the panel of the Fourth Circuit failed to address the precedents from the other Circuits, finding error in the admission of similar statements as those included in the testimony of the government agents against the Petitioner at trial. This failure leads to a conflict between the Fourth Circuit on the one hand, for its failure to address this clearly-presented issue, and the Fifth and Sixth Circuits on the other. Such a conflict calls for a definitive statement from this Court as to the admissibility of such testimony.

CONCLUSION

For the reasons addressed above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH E. LABOWITZ
LABOWITZ AND LABOWITZ
605 Prince Street
Alexandria, Virginia 22314
Counsel for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5252

United States of America,

Appellee,

v.

Calvin W. Cole,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge.

Argued: April 11, 1980 Decided: June 3, 1980

Before HALL and PHILLIPS, Circuit Judges; and HOUCK, District Judge.*

Kenneth E. Labowitz (Labowitz and Labowitz on brief) for Appellant; Joseph J. Aronica, Assistant United States Attorney (Justin W. Williams, United States Attorney, James Roland DiFonzo, Special Assistant United States Attorney on brief) for Appellee.

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*Hon. C. Weston Houck, United States District Judge, District of South Carolina, sitting by designation.

PER CURIAM:

Calvin Cole was convicted of embezzling government funds in violation of 18 U.S.C. §641. He appeals, alleging error in certain evidentiary rulings by the district court. Finding no error, we affirm the conviction.

Appellant was president of Virginia International Testing Laboratories, Inc. [VITL], which was under government contract with the General Services Administration [GSA] to conduct a program for motor vehicle tire testing. All money due under the contract was to be paid directly to an assignee, the First National Bank of Western Maryland.

Testimony at trial showed that on September 20, 1974, the government erroneously issued a check payable directly to VITL in the amount of $69,894.08. On October 4, 1974, GSA claims examiner Mary Rowe spoke to appellant about the erroneous check, but he denied receiving it. A few days later a verbal stop payment order was issued but apparently had no effect. The government issued another check to fulfill its obligation to the assignee bank.

Mary Rowe and GSA finance officer Stephen Tysinger questioned appellant about the missing check on October 7 and again on November 5, 1974. Each time appellant denied having received it. Appellant was later asked to sign a statement to that effect and did so in December 1974.

Subsequently, appellant admitted that he received the check in October and deposited it to VITL's account, and the funds were spent almost immediately on various VITL expenses. Appellant claimed, however, that he thought the check was payment properly issued to VITL pursuant to "Modification 5," a contract modification he had negotiated with GSA contracting officer James Williams to compensate for increased gasoline costs and other expenses resulting from the lowering of the national speed limit to 55 mph. It included some retroactive compensation, but it also specified no change in the

manner of payment. Appellant explained that he thought the check he received on October 20 was the retroactive portion of "Modification 5," which had become effective five days earlier.

Cole was convicted on only one of the three counts charged in the original indictment. Another count charged that he had made "false, fictitious and fraudulent statements" concerning receipt of the check, in violation of 18 U.S.C. § 1001.[1] Cole succeeded in having this count dismissed, with the government's consent, based on the "exculpatory 'no' " defense, which precludes conviction under § 1001 based only on false exculpatory denials in response to investigative questioning. *See Paternostro v. United States,* 311 F.2d 298 (5th Cir. 1962); *United States v. Chevoor,* 526 F.2d 178 (1st Cir. 1975); *cert. den.* 425 U.S. 935 (1976); *United States v. Ehrlichmann,* 379 F. Supp. 291 (D.D.C. 1974) *but see United States v. Adler,* 380 F. 2d 917 (2nd Cir. 1967).

Appellant's primary contention is that the "exculpatory 'no' " doctrine requires the exclusion of his statements denying receipt of the check. He asserts that the court violated the "widely recognized principle that a defendant should not be prosecuted for his negative responses to questions put to him by government officers," by allowing him to be convicted on the same evidence that would be impermissible to sustain a conviction under § 1001. We disagree.

The "exculpatory 'no' " doctrine is not a rule of evidence but rather defines the reach of 18 U.S.C. § 1001.[2] Section 1001

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[1]A third count, under 18 U.S.C. § 287, was dismissed upon the government's motion after the jury announced it was deadlocked.

[2]We express no view as to the merits of the "exculpatory 'no' " doctrine or the correctness of its application in the dismissal of the § 1001 count in this case. Assuming, *arguendo* that it precluded the § 1001 prosecution in this case, it has no bearing whatever upon the embezzlement statute under which appellant was convicted.

carries harsher penalties than those under the perjury statute, 18 U.S.C. § 1621, but without the latter's materiality requirement and procedural safeguards. The "exculpatory 'no' " doctrine holds that to impose so severe a penalty under § 1001 for mer denials in the face of an investigator's questioning would circumvent the perjury statute. *United States v. Shanks,* 608 F.2d 73, 75 (2d Cir. 1979), *United States v. Chevoor, supra* at 184.

Here we are faced with an entirely different question—whether Cole intended to misappropriate the check. 18 U.S.C. § 641. There could hardly be a more relevant indication of that intent than appellant's denial that he ever received it. Appellant's objection that the statements are inadmissible hearsay is also meritless. F.R.E. 801(d)(2).

Appellant also contends that the district court erred in limiting his cross examination of government witness James Williams. Williams testified concerning the operation of the contract. In the course of his testimony, he stated that he first became aware of Cole's desire to obtain a modification of the contract in early September 1974. Appellant sought to question him concerning a newspaper article dated two months earlier in July 1974 in which Williams was quoted as saying he was aware of VITL's problem. The district court sustained the government's objection that the inquiry was irrelevant.

We find no error in the district court's ruling. The date on which Williams knew that appellant was seeking additional compensation was clearly irrelevant to the issue of appellant's intent to misappropriate the check. The negotiations, terms, conditions and effect of "Modification 5" were fully before the jury insofar as they had any bearing on the credibility of appellant's story.

The discrepancy in Williams' recollection of the dates, moreover, was brought out on cross examination. We fail to see

how any further pursuit of the irrelevant issue of VITL's need for money in July 1974 could have had any effect on Williams' credibility, especially in light of the documentary nature of the case and the defendant's own admissions.

The right of confrontation and cross examination is a precious one, essential to a fair trial. *United States v. Caudle,* 606 F.2d 451 (4th Cir. 1979). But it is not so broad as to deprive the district court of all discretion in limiting needless or confusing inquiry into collateral matters. *Davis v. Alaska,* 415 U.S. 308, 316 (1974); *United States v. Haro,* 573 F.2d 661 (10th Cir.); *cert. den.* 439 U.S. 851 (1978).

Accordingly, the conviction is affirmed.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5252

United States of America,

Appellee,

versus

Calvin W. Cole,

Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Hall for a panel consisting of Judge Hall, Judge Phillips, and Judge Houck (U.S.D.J.).

For the Court,

[FILED
JUL 23 1980
U.S. Court of Appeals
Fourth Circuit]

/s/ William K. Slate, II
CLERK

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5252

United States of America,
Appellee,

versus

Calvin W. Cole,
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc; and the appellant's motion for stay of issuance of mandate pending consideration of the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing is DENIED.

IT IS FURTHER ORDERED that the motion for stay of issuance of mandate pending consideration of petition for rehearing en banc is DENIED.

Entered at the direction of Judge Hall, with the concurrence of Judge Phillips and Judge Houck.

[F I L E D
AUG 21 1980
William K. Slate, II
Clerk]

For the Court,

/s/ William K. Slate, II
CLERK